NO. 48708-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SEAN LANCASTER,

Respondent-Cross Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Appellant-Cross Respondent.

OPENING BRIEF OF THE DEPARTMENT OF CORRECTIONS

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I. INTRODUCTION

The Department of Corrections (Department) appeals the trial court's award of penalties under the Public Records Act (PRA) to inmate Sean Lancaster for his public records request in which he sought inmate phone logs. A private company, Global Tel-Link (GTL), operates the Department's inmate phone system. As part of its system, GTL generates a log of the calls made by an inmate or what is referred to as a phone log. The Department only accesses and uses GTL's phone logs for specific investigative purposes. In 2013, the Department took the position that inmate phone logs were not public records unless they were pulled from the GTL system for use in agency business. Seven inmates, including Sean Lancaster, submitted public records requests for their inmate phone logs. The Department denied each request based on its position at the time that the phone logs were not public records.

After the Department denied the requests, the inmates, including Lancaster, sued the Department claiming a violation of the PRA. The Department—having reevaluated its position on inmate phone logs as a result of other litigation by two inmates at the Coyote Ridge Corrections Center in Franklin County—promptly made the records available to these inmates after they filed suit. In the resulting litigation in Thurston County, the trial court found that the Department's position that phone logs were

not public records unless accessed or used by the Department was objectively reasonable and based on a good faith understanding of the law. Yet, despite evidence that the phone logs had never been accessed or used by the Department, the trial court found bad faith and awarded penalties to the requesters, including Lancaster, because the Department failed to search for records and failed to inform the requesters that phone logs could be public records under different circumstances.

The Department appealed these rulings, and four of the cases were consolidated. The remaining cases, including the present case, were stayed pending resolution of the consolidated case. In February 2017, Division I of the Court of Appeals reversed the award of penalties in the consolidated case. Consistent with the opinion in the consolidated case, this Court should also reverse. The Department's conduct did not amount to bad faith and therefore the trial court erred in awarding penalties. Additionally, the trial court erred in awarding penalties in this case because neither the failure to search nor the failure to inform the requester caused the denial of the requested records. Based on the Department's position at the time—which the trial court specifically found was reasonable—the Department would not have produced the requested phone logs even if such a search had been conducted or the requester had been informed that some phone logs could be public records. In finding bad faith, the trial court

erroneously determined that there was no causation requirement in RCW 42.56.565(1), i.e. no requirement that the bad faith result in the denial of any record. This determination was error and this Court should reverse and remand.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in finding the Department acted in bad faith under RCW 42.56.565(1).

2. The trial court erred in ruling that RCW 42.56.565(1) does not include a requirement that the agency's bad faith caused the denial of the requested records.

3. The trial court erred in awarding Lancaster costs in light of the absence of bad faith and the Department's offer of judgment.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did the trial court err in finding that the Department's denial of records based on an objectively reasonable position constituted bad faith under RCW 42.56.565(1)?

2. Does the plain language of RCW 42.56.565(1), which states that "the agency acted in bad faith in denying the opportunity to inspect or copy a record," include a causation requirement?

3. Did the trial court err in ruling that the Department denied the requester records in bad faith when the denial of the records was based

on an objectively reasonable policy and its decision to not search for phone logs would not have resulted in the disclosure of records because none of the requested records were ever accessed or used by the Department?

4. If the trial court erred in finding bad faith, did the trial court also err in awarding all requested costs in light of the Department's offer of judgment?

IV. STATEMENT OF THE CASE

A. The Department's Determination That Logs of Phone Calls Made by Inmates to Private Citizens and Maintained and Possessed by a Private Company Were Not Public Records

The Department contracts with a private company, Global Tel-Link (GTL), to run and maintain its inmate phone system. CP 92. In 2013, the Department became aware of a significant security incident where an offender obtained a log of all calls made by another offender through public disclosure. CP 89, 93. The requester was a member of a Security Threat Group[1] and the inmate whose call logs were requested was a confidential informant. CP 89, 93.

In light of the significant security concerns and potential for violence that could come from inmates obtaining copies of inmate phone logs, the Department evaluated whether such logs were subject to public

[1] A Security Threat Group is the term that the Department uses for prison gangs.

disclosure under the PRA. CP 94, 98. The Department considered that it had no role in the operation, maintenance, or charging for phone services. CP 98. Additionally, although the Department investigators may access phone records or monitor phone calls for possible criminal activity or other malfeasance, the Department does not retrieve call logs from the GTL servers or otherwise use or maintain the logs, except for in narrow investigative circumstances. CP 93. In fact, the majority of the Department's over 16,000 offenders are never part of any investigation, and only a minority of those offenders who are the subject of an investigation would ever have their phone logs pulled and accessed by the Department's investigators. CP 260.

After considering the nature of the requested records, the definition of a public record and the applicable case law, as well as consulting with members of the Attorney General's Office, the Department determined that inmate phone logs maintained and possessed by GTL were not public records unless the Department accessed and used the logs for agency business. CP 98. As such, the Department took the position that phone logs generally did not need to be produced in response to public record requests. CP 98.

In June 2013, the Department issued Newsbrief[2] 13-01 to provide guidance to its staff on how to process public record requests for phone logs. CP 97, 101, 103. Because phone logs were maintained within the GTL system, Newsbrief 13-01 directed staff to notify requesters that the Department did not consider inmate phone logs to be public records. CP 97, 101, 103. The Newsbrief recognized that records pulled from the GTL system and used in agency business might be public records. CP 97, 101, 103. The Newsbrief, however, did not direct staff to search for these records, but rather was intended to assist staff in handling phone logs which had already been retrieved from the third party phone system for use in agency business and may turn up in other record searches. CP 256-57. If staff had a specific reason to believe the requested records were pulled and used as part of an investigation, staff also would be expected to search for them. CP 256-57.

B. The Phone Log Requests and Resulting Litigation

In September 2013 and February 2014, the Department's position on phone logs was the subject of two lawsuits in Franklin County Superior Court brought by inmate Joseph Jones and former inmate Karl Tobey. CP 107. In those cases, the trial court held that phone logs were public records

[2] Newsbriefs are internal memoranda issued by the Department's Public Records Officer containing written guidelines to provide public disclosure staff guidance on specific public disclosure issues. CP 97.

but denied Jones and Tobey penalties because it found that the Department did not act in bad faith in denying the records and its position was reasonable. CP 107.

During the Franklin County litigation, the Department received numerous additional inmate requests for inmate phone logs. Specific to this case, the Department received the request from Lancaster on November 6, 2014. CP 107, 110. This request was received prior to the conclusion of the Franklin County litigation. *See* CP 107, 116-26. Lancaster sought any and all records of inmate phone calls at SCCC involving his pin number and he stated that he specifically was seeking each outgoing number called or attempted; the date and time of each call; and from which telephone the call was made. CP 107, 110. In response to Lancaster's request for phone records, the Department timely notified him that that the Department did not consider the requested phone logs to be public records because the phone system is run and maintained by an outside vendor. CP 107, 112.

In response to the rulings in Franklin County, the Department evaluated its options, including an appeal of the Franklin County decisions and a request for legislation to address the issue. CP 99, 106-07. However, in February 2015, it decided to begin producing phone logs in response to public record requests by obtaining the records from the GTL system and

providing the records to the requester. CP 106-07. Meanwhile, inmates filed nine actions[3] in Thurston County Superior Court challenging the Department's responses to their public record requests and seeking monetary penalties. Upon receiving notice of each of the lawsuits, the Department promptly made the requested phone logs available to the requesters, and like the other requesters, Lancaster was provided the phone logs promptly after he filed suit. CP 108, 114; *see also Cook v. Washington State Dep't of Corr.*, 197 Wn. App. 1061, 2017 WL 478321, at *2 (2017), *review denied*, 188 Wn. 2d 1016, 396 P.3d 338 (2017).[4]

C. The Trial Judge Concluded the Department's Policy Was Objectively Reasonable but the Department's Failure to Conduct a Search Was Bad Faith Regardless of Whether It Would Have Resulted in the Production of Records Under the Department's Policy

In each of the phone log cases, including this case, the Department ultimately conceded that inmate phone logs were public records. The

[3] Four of those cases were consolidated and decided in *Cook v. Washington State Dep't of Corr.*, 197 Wn. App. 1061, 2017 WL 478321 (2017), *review denied*, 188 Wn.2d 1016, 396 P.3d 338 (2017). One case was voluntarily dismissed in the superior court. *Joseph Henry v. DOC*, Thurston County Superior Court Cause No. 15-2-00045-1. Another case was resolved by the parties after the filing of the appeal. *Kevin Evans v. DOC*, Division II Court of Appeals Cause No. 48764-1-II. Three cases, including this case, were stayed pending resolution of the consolidated appeal. After the opinion was issued in the consolidated appeal, two of those cases were voluntarily dismissed. *See Larry Givens v. DOC*, Division II Court of Appeals Cause No. 48768-3-II; *Brady Lewis v. DOC*, Thurston County Superior Court Cause No. 15-2-01279-4.

[4] Consistent with GR 14.1, the Department recognizes that this case is unpublished, that the opinion is not binding on any court, that the opinion has no precedential value, and that it is cited only for factual background and for such persuasive value as the court deems appropriate. *See* General Rule 14.1(a) (allowing citation to unpublished opinions); *see also Crosswhite v. Wash. State Dept. of Social & Health Services*, 197 Wn. App. 539, 544, 389 P.3d 731 (2017).

Department argued, however, that the requesters were not entitled to penalties under RCW 42.56.565(1) because the Department did not deny records in bad faith. CP 72-90. The Department contended that it had initially denied the requested records in good faith because it reasonably believed the phone logs were not public records. CP 80-82. The Department also argued that it would not have found responsive records among those used or accessed by the Department even if it had it searched for the specific phone logs; therefore, the failure to search did not cause the denial and could not amount to bad faith under RCW 42.56.565(1). CP 248-53.

The trial court agreed with the Department and found that the Department did not act in bad faith when the Department decided inmate phone logs possessed only by GTL were not public records. The court concluded the Department's position was objectively reasonable and not in bad faith. CP 241-245. However, the trial court found that the Department acted in bad faith because the Department failed to search to see if the specific phone logs had ever been accessed for agency business and failed to inform the requester that inmate phone logs could be public records if they had been accessed for use in agency business. CP 245-47.

Despite evidence that the Department had never accessed the requested phone logs for agency business and had never used the

particular phone logs, the trial court found the absence of a search constituted bad faith. CP 260-61. The trial court reached this conclusion despite the evidence that the denial of records resulted from the objectively reasonable policy and a search would not have changed the outcome of the request based on the policy at the time. In reaching this conclusion, the trial court rejected the argument that there is a causation requirement in RCW 42.56.565(1), i.e. that the failure to search must actually cause the denial of records. CP 319. Based on its finding of bad faith, the trial court awarded Lancaster penalties in the amount of $25 per day totaling $2,925. CP 246-47. The trial court denied the Department's motion for reconsideration. CP 319.

D. The Consolidated Phone Log Appeal

The Department appealed each of the trial court's rulings that awarded penalties to the various requesters. Upon the Department's motion, four of the cases were consolidated by this Court under cause number 48186-3-II. Lancaster's case was stayed pending a decision in the consolidated case. On February 6, 2017, Division I[5] of the Court of Appeals issued an unpublished opinion reversing the award of penalties. *Cook v. Washington State Dep't of Corr.*, 197 Wn. App. 1061, 2017 WL 478321 (2017). The court reversed the trial court's finding of bad faith

[5] After consolidation, the consolidated case was transferred to Division I for disposition.

concluding that "the Department did not act willfully or wantonly with utter indifference to the consequences" because the Department's policy was objectively reasonable and it acted in conformity with that policy. *Cook*, 2017 WL 478321, at *1. The Supreme Court denied review on June 28, 2017, and this Court subsequently lifted the stay in this matter.

V. STANDARD OF REVIEW

The trial court's determination that an agency acted in bad faith in responding to a Public Records Request under RCW 42.56.565(1) is a mixed question of law and fact that is reviewed de novo. *Faulkner v. Dep't of Corrections*, 183 Wn. App. 93, 101-02, 332 P.3d 1136 (2014); *Francis v. Dep't of Corrections*, 178 Wn. App. 42, 51-52, 313 P.3d 457 (2013).

VI. ARGUMENT

An inmate is not entitled to daily penalties under the Public Records Act unless the agency acted in bad faith "in denying the person the opportunity to inspect or copy a public record." RCW 42.56.565(1).

RCW 42.56.565(1) contains two components. First, it contains a subjective or state-of-mind component, bad faith. To demonstrate bad faith, an inmate must show a wanton or willful act or omission by the agency. *Adams v. Wash. State Dep't of Corr.*, 189 Wn. App. 925, 938-39, 361 P.3d 749 (2015). Second, it contains a causation requirement,

i.e. that the bad faith resulted in the denial of a record. RCW 42.56.565(1) (providing penalties for "bad faith *in denying the person the opportunity to insect or copy a public record*" (emphasis added)).

The trial court erred in finding bad faith in this case because neither the subjective nor objective component is met. First, the Department denied the requests for phone logs based on its determination that inmate phone logs generated and held by a third party vendor and never used by the Department were not public records. As the trial court concluded in this case and Division I of the Court of Appeals concluded in the consolidated *Cook* appeal, the Department's position was objectively reasonable.

Second, the trial court erred in finding bad faith by overlooking the causation requirement of RCW 42.56.565(1). The trial court wrongly concluded that the Department acted in bad faith by not searching to see if the requested phone logs had ever been accessed by the Department for agency business. But no such phone logs would have been found if the Department had conducted this search at the time of the request. Thus, the failure to search played no role "in denying" the opportunity to inspect or copy the record and did not cause the denial of records. In concluding that bad faith was present, the trial court erroneously concluded that the alleged bad faith could

exist on its own, and did not need to cause the denial of the records. This interpretation of RCW 42.56.565(1) conflicts with the provision's plain language as well as the legislative history and existing Public Records Act case law.

When applying the correct standard, the trial court erred in awarding penalties. The denial of records was a result of the Department's reliance on its objectively reasonable policy as the court in *Cook* held. Because the trial court erred in finding bad faith despite the absence of causation, the court's award of penalties to Lancaster should be reversed.

A. The Trial Court Erred in Finding Bad Faith and Awarding Penalties Despite Its Conclusion That the Department Denied Lancaster's Request Based on an Objectively Reasonable Position

RCW 42.56.565(1) requires a showing of bad faith. Courts have interpreted this provision to require a showing of a wanton or willful act or omission by the agency. *Adams v. Wash. State Dep't of Corr.*, 189 Wn. App. 925, 938-39, 361 P.3d 749 (2015). Wanton has been defined as unreasonably or maliciously risking harm while being utterly indifferent to the consequences. *Faulkner v. Wash. Dep't of Corr.*, 183 Wn. App. 93, 103–04, 332 P.3d 1136 (2014). Bad faith is not shown by a

mere violation of the PRA; it only applies to an agency's most culpable acts that defeat the purposes of the PRA.

The trial court correctly concluded that the Department did not act in bad faith in taking a position that inmate phone logs were generally not public records. An agency does not act in bad faith "simply for making a mistake in a record search or for following a legal position that was subsequently reversed." *Francis*, 178 Wn. App. at 63. And even when an agency violates the PRA by not disclosing a record, reliance on an invalid basis for nondisclosure does not result in a finding of bad faith, so long as the basis is not farfetched or asserted with knowledge of its invalidity. *See King Cnty. v. Sheehan*, 114 Wn. App. 325, 356-57, 57 P.3d 307 (2002) (noting "although we do not find the County's arguments against disclosure to be persuasive, they are not so farfetched as to constitute bad faith."); *see also Adams*, 189 Wn. App. at 951. Rather, a finding of bad faith requires a wanton or willful act or omission by the agency and incorporates "a higher level of culpability than simple or casual negligence." *Faulkner*, 183 Wn. App. at 93.

Here, the Department's decision to evaluate whether phone logs were public records was based on security concerns that were reasonable. CP 98. And when the Department received a decision by Franklin County that inmate phone logs were public records, the Department changed its

policy and it provided the records promptly upon receiving the multiple lawsuits in Thurston County. CP 106-07. These factual circumstances are similar to *Sheehan*. In *Sheehan*, the court criticized the County's response for not providing an adequate explanation of why the records could be released to some individuals but not others. *Sheehan*, 114 Wn. App. at 340-41. The court noted that the County refused to release the records to the requesters despite having a policy of routinely releasing the information to other requesters. *Id.* Yet, the court found no bad faith in denying the records because its arguments were not farfetched and motivated by reasonable concerns. *Id.* at 356-57. The trial court reached the same conclusion about the reasons that the Department denied Lancaster the requested records. CP 245. Specifically, the trial court found that "[t]he Department's approach appears to have been based on a good faith understanding of the law, including awareness of all three elements in the definition of public records." CP 244-45.

Despite correctly holding that the Department's position that phone logs were not public records was objectively reasonable, the trial court went on to premise the award of penalty on its conclusion that the Department acted in bad faith by failing to search and failing to provide the requester notice of the fact that inmate phone records might be considered public records if they had been accessed by the Department for

use in agency business. CP 245-46. This conclusion ignores that the reason that the Department denied the request was because of its objectively reasonable position that inmate phone logs were not public records unless the Department had obtained them from the private vendor and used them for agency business. Additionally, this conclusion ignored the evidence that a search at the time of the request would not have changed the Department's response because none of the requested phone records were ever accessed by the Department. CP 260-61.

Division I of the Court of Appeals reversed the finding of bad faith in a nearly identical situation. *Cook*, 197 Wn. App. 1061, 2017 WL 478321 (2017). While unpublished, this Court should give particular weight to the *Cook* ruling given the similar requests and circumstances. In *Cook*, the court held that the Department's response to four other phone log requests consistent with its objectively reasonably policy was not in bad faith. 2017 WL 478321, *4. Specifically, the court held "[t]he Department reasonably complied with its then-existing objectively reasonable belief that phone logs were not public records." *Id*. In reversing the finding of bad faith, the court also acknowledged that the Department reconsidered its policy and made the records promptly available to the requesters upon notice of the lawsuit. *Id*. In addressing the specific grounds of the trial court's finding of bad faith the court held that "[u]nder

these circumstances, the failure to search or disclose to inmates that exhibits to investigations may be public records did not jeopardize the sovereignty of the people or government accountability." *Id.*

This Court should follow *Cook*. As the *Cook* court noted, the failure to notify the requesters of every contour of the Department's policy did not amount to bad faith under these circumstances. *Cook* at 2017 WL 478321, *4. Yet the trial court premised bad faith on the failure to explain the entire scope of the Department's internal policy and in doing so, failed to account for its conclusion that the policy itself reflected an objectively reasonable determination that the requested records were not public records. By focusing on one specific aspect of the Department's conduct without focusing on the specific reason that the records were denied, the trial court erred in concluding the Department acted in bad faith.

The trial court's approach to bad faith is not supported by any of three published cases that discuss bad faith. All three of those cases considered the agency's conduct as a whole to determine whether or not the agency acted in bad faith in the denial of records. *See Adams*, 189 Wn. App. at 941-50; *Faulkner*, 183 Wn. App. at 107-08; *Francis*, 178 Wn. App. at 63-64. Although *Francis* discussed the adequacy of the agency's search as a factor to consider on bad faith, it was undisputed that the failure to search resulted in the failure to produce records and the *Francis*

court recognized that a failure to search by itself did not necessarily constitute bad faith. *Francis*, 178 Wn. App. at 63 n.5. In contrast, the Department's decision not to search for records that it reasonably believed were not public records did not result in the denial of any records. Here, however, the trial court erroneously viewed the failure to search in isolation because the Department's failure to search did not result in the denial of any records.

For the reasons discussed above, the trial court erred in finding bad faith and awarding penalties. The trial court should have found that Lancaster is not entitled to penalties because the Department did not deny records in bad faith. Thus, the trial court's award of penalties should be reversed and the case should be remanded with instructions that the trial court enter a finding that the Department did not act in bad faith and that Lancaster is not entitled to penalties as a result.

B. The Trial Court Further Erred in Awarding Penalties Because RCW 42.56.565(1) Requires Any Bad Faith to Have Caused the Denial of Records

In interpreting statutes, courts "try to determine and give effect to the legislature's intent." *Francis*, 178 Wn. App. at 59-60. When the statute's meaning is plain on its face, courts give full effect to the plain meaning. *Id.*; *Robbins, Geller, Rudman, & Dowd, LLP v. State*, 179 Wn. App. 711, 720-21, 328 P.3d 905 (2014). When the plain language is

ambiguous, courts look to principles of statutory construction and legislative history. *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 469, 98 P.3d 463 (2004).

In 2011, faced with increasing abuse by inmates of the Public Records Act, the legislature passed Substitute Senate Bill 5025. This provision, codified as RCW 42.56.565(1), severely restricts an inmate's ability to obtain penalties for public records requests. *Faulkner*, 183 Wn. App. at 105-06 (citing S.B. 5025, 62nd Leg. Reg. Sess. (Wash. 2011)). RCW 42.56.565(1) prohibits a court from awarding daily penalties to an inmate "unless the court finds that the agency acted in bad faith *in denying* the person the opportunity to inspect or copy a public record" (emphasis added). Under this statute, an inmate seeking PRA penalties has the burden of persuasion to show the Department acted with bad faith in denying the requester the opportunity to inspect or copy a public record. *See Adams*, 189 Wn. App. at 952.

The trial court's holding that RCW 42.56.565(1) did not require causation was in error. The causation requirement, i.e. the requirement that the agency's bad faith must have actually caused the denial of the record, is plain on the face of the statute. Both the grammatical structure of the statute and its plain language demonstrate that RCW 42.56.565(1) has a causation element.

In full, RCW 42.56.565(1) states:

> A court shall not award penalties under RCW 42.56.550(4) to a person who was serving a criminal sentence in a state, local, or privately operated correctional facility on the date the request for public records was made, unless the court finds that the agency *acted in bad faith in denying the person the opportunity to inspect or copy a public record*. (Emphasis added).

Here, the term "bad faith" is modified by the last clause ("in denying the person the opportunity to inspect or copy a public record") and there is no comma before the clause. The absence of a comma makes the clause a restrictive modifier that limits the essential meaning of the term "bad faith." *See* William Strunk Jr. & E.B. White, *The Elements of Style* 94 (4th Ed. 2000). The clause explicitly restricts the type of bad faith that the court must find in order to award penalties to an inmate requester—only bad faith that results in the denial of records.

Moreover, the phrase used in that restrictive clause is a term of art in the penalty provisions of the Public Records Act. Terms of art must be given their technical meaning. *See Swinomish Indian Tribal Cmty. v. Wash. State Dep't of Ecology*, 178 Wn.2d 571, 581, 311 P.3d 6 (2013). RCW 42.56.550(1) authorizes penalties where a requester was wrongfully "denied an opportunity to inspect or copy a public record by an agency." RCW 42.56.550(4) repeats that language in setting the permissible range of penalty, authorizing a daily penalty only where the requester "was

denied the right to inspect or copy said public record." The denial of "an opportunity to inspect or copy a public record" is distinct from the right to receive a response. *See Sanders v. State*, 169 Wn.2d 827, 848, 240 P.3d 120 (2010) (distinguishing between the right to receive a response and the right to inspect or copy a record); *Hikel v. City of Lynnwood*, 197 Wn. App. 366, 379, 389 P.3d 677 (2016) (distinguishing between procedural violations and the denial of the opportunity to inspect or copy). By using the phrase "denied an opportunity to inspect or copy a public record by an agency" the legislature explicitly permitted penalties only where records were denied in bad faith and not for technical violations of the PRA.

Because an agency can act in bad faith only when it "den[ies] the person *the opportunity to inspect or copy a public record*" under RCW 42.56.565(1) (emphasis added), a court must find that the bad faith resulted in the denial of records to award penalties. The trial court here did not find bad faith because the Department's reason for denying the records was farfetched or otherwise in bad faith. Indeed, it ruled that the Department's position that the phone logs were not public records was objectively reasonable and *not* in bad faith. Rather, it found the Department's failure to conduct a search that would not have resulted in a different response and failure to provide additional information about its position constituted bad faith. This ruling ignored the technical meaning of

"denied an opportunity to inspect or copy a public record" and instead conflates it with the "right to receive a response." The trial court erred in ignoring this distinction and the causation requirement found in the plain language of RCW 42.56.565(1).

Furthermore, even if the language of RCW 42.56.565(1) were ambiguous, the causation requirement is confirmed by the legislative history of the provision. RCW 42.56.565(1) was enacted in 2011 to severely limit an inmate's ability to recover penalties under the PRA. In enacting RCW 42.56.565(1), the legislature "increased the level of culpability needed for an award to an inmate." *Faulkner*, 183 Wn. App at 105. This statutory provision was intended to curb abuses by inmates and allow "penalties for inmates only when the agency defeats the purpose of the PRA." *Id* at 106. The inmate penalty amendment first appeared in Senate Bill 5025 as a complete ban on inmates receiving penalties. Senate Bill 5025, 62nd Leg. Reg. Sess., § 1(5) (Wash. 2011). The Act itself was originally called: "An Act Relating to making requests by or on behalf of an inmate under the public records act ineligible for penalties." Laws of 2011, ch. 300, § 1 (adding RCW 42.56.565(1)). While the complete ban on inmate penalties was ultimately amended to allow a narrow exception, the progression of the bill is instructive.

This interpretation is confirmed by other aspects of the legislative history. When the legislature considered the adoption of the bad faith requirement, testimony supporting the bill indicated that the bill removed the financial incentive for inmates to submit burdensome requests but allowed penalties when the "inmate can prove that an agency has acted in bad faith *in failing to produce records*." House Bill Report Substitute Senate Bill 5025 (emphasis added), *available at http://app.leg.wa.gov/DLR/billsummary/default.aspx?Bill=5025&year=2011*. The legislature adopted the bill with the understanding that the bad faith requirement focused on whether or not the agency denied a record in bad faith.

The legislature's clear intent to impose a higher burden for inmates to recover penalties is not served by reading a causation element out of RCW 42.56.565(1) and would allow inmates to obtain penalties in circumstances not available to other requesters. Courts have not awarded freestanding daily penalties where a record was properly withheld but other technical violations of the PRA occurred. *See, e.g.*, *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 809, 246 P.3d 768 (2011) ("penalties are authorized only for denials of 'the right to inspect or copy'"); *City of Lakewood v. Koenig*, 182 Wn.2d 87, 343 P.3d 335 (2014) (same; declining to award penalties for an insufficient brief explanation);

Neighborhood Alliance of Spokane Cnty. v. Cnty. of Spokane, 172 Wn.2d 702, 261 P.3d 119 (2011) (declining to award daily penalties for a freestanding violation for an inadequate search); *see also Hikel v. City of Lynnwood*, 197 Wn. App. 366, 379, 389 P.3d 677 (2016) (concluding there are no penalties for procedural violations). Allowing inmates to obtain penalties where other requesters may not would turn the language and intent of RCW 42.56.565(1) on its head. The legislature's purpose in enacting RCW 42.56.565 was to restrict an inmate's ability to obtain penalties for public records requests. The trial court's ruling expands an inmate's ability to recover penalties as opposed to limiting it.

A contrary conclusion would mean that an inmate would have greater rights to receive penalties under the Public Records Act than non-inmate requesters. For example, under the trial court's theory, an inmate might be entitled to daily penalties if the court found that the agency provided an inadequate brief explanation and that failure was bad faith. Although it is an open question whether non-incarcerated requesters would be entitled to penalties, it would be absurd to conclude that in enacting RCW 42.56.565(1) the legislature had intended to give inmates greater opportunities to receive penalties than non-incarcerated individuals.

Moreover, in enacting RCW 42.56.565(1) the legislature sought to adopt a requirement for penalties under the PRA that had previously been discussed and rejected by the courts for non-inmate requesters. In *Yacobellis v. City of Bellingham*, 64 Wn. App. 295, 301, 825 P.2d 324 (1992), the Court rejected the argument that a non-inmate requester must make a showing of bad faith to obtain penalties under the PRA. *Yacobellis*, 64 Wn. App. at 301 (citing former RCW 42.17.340, which was re-codified as RCW 42.56.550 in Laws of 2005, ch. 274, § 288). RCW 42.56.565(1) essentially reverses the *Yacobellis* decision as applied to inmate requests (but only as to inmate requests). And where the *Yacobellis* court observed that a penalty under former RCW 42.17.340 "does not depend upon a finding that the governmental agency's nondisclosure *was the result of* bad faith," *Yacobellis*, 64 Wn. App. at 301 (emphasis added), the legislature took the directly opposite approach in RCW 42.56.565, making the award of penalties specifically dependent upon a finding that nondisclosure of a record was the result of bad faith.

In each of the two Court of Appeals decisions which have considered RCW 42.56.565(1) and found that the agency acted in bad faith, the agency's bad faith conduct actually caused the denial of records. *See Adams v. Wash. State Dep't of Corr.*, 189 Wn. App. 925, 941-50, 361 P.3d 749 (2015); *Francis*, 178 Wn. App. 42, 63-64, 313 P.3d 457 (2013).

In *Francis*, the Court found that the agency acted in bad faith when it conducted a cursory search and failed to produce responsive records as a result of that cursory search. 178 Wn. App. at 63-64. Similarly, in *Adams*, the Court held that the agency's position that RAP sheets were exempt from the PRA was "legally indefensible" and that the denial of records in accordance with this position therefore amounted to bad faith. 189 Wn. App. at 949. Indeed, even the case where the Court of Appeals found the agency did not act in bad faith focused on the agency conduct which actually resulted in the denial of records. In *Faulkner*, the Court analyzed the agency's inadvertent error which led to the denial of the record in finding that the Department did not act in bad faith. *See Faulkner v. Wash. Dep't of Corr.*, 183 Wn. App. 93, 106-08, 332 P.3d 1136 (2014). Specifically, the Court noted "[t]he error in production was the result of an inadvertent mistake in summarizing the request." *Faulkner*, 183 Wn. App at 107. These cases confirm that the specific and proper inquiry under RCW 42.56.565(1) is whether the agency denial of records was the result of bad faith. The trial court's ruling improperly expanded this bad faith inquiry.

Finally, the policy behind the PRA's penalty provisions supports the requirement that there must be a causal connection between the bad faith and the denial. The purpose of the PRA's penalty provision is to

"deter improper denials of access to public records," and more specifically the purpose of the inmate penalty provision is to limit an inmate's ability to receive penalties. *Faulkner*, 183 Wn. App at 106 (citing *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 461, 229 P.3d 735 (2010)). Without the causal connection between the bad faith and the denial of records in RCW 42.56.565(1) this policy would not be furthered because conduct unrelated to the denial may give rise to penalties. It would also increase inmate litigation under the PRA because inmates would file actions against agencies to seek penalties for technical violations of the PRA.

Indeed, this case demonstrates the difficulty that adopting the trial court's approach would create in evaluating bad faith. Contrary to the plain meaning and the intent of the statute, the trial court shifted the bad faith inquiry from the denial of records to other aspects of the agency's conduct. This approach will create almost endless mini-trials over whether a specific, isolated aspect of the agency's response was in bad faith. That approach is inconsistent with the prior case law and unsupported by the statutory language. Here, the denial of records was not the result of any bad faith by the agency but rather it was based on an objectively reasonable policy. As such, stand-alone penalties for a technical violation divorced from the denial of records are contrary to the policies of the PRA and the bad faith provision because it would not deter any improper

denials of records and would encourage inmates to file more PRA lawsuits.

Therefore, in order to award penalties under RCW 42.56.565(1), trial courts must consider whether the agency's bad faith *caused* the denial of records. The trial court in this case erred in ignoring that requirement and imposing penalties based on the Department's failure to search and failure to notify Lancaster of its entire position related to phone logs. This conclusion ignored the Department's denial of the requested records was based on its objectively reasonable position regarding inmate phone logs. A search of the Department's investigative files would not have yielded any records that were used for any agency purpose because there is no credible evidence that the Department ever accessed Lancaster's records for any investigative or disciplinary purpose. CP 262-75. Furthermore, nothing in the PRA clearly establishes an agency's obligation to check to see if records that are typically maintained by a third party contractor have been accessed for use by the agency.

Similarly, a letter notifying Lancaster that inmate phone logs could be public records if accessed or used by the Department would not have changed the response because the requested phone logs had not been accessed or used. In other words, based on its reasonable policy, the Department's response would have been the same regardless of whether or

not it searched and regardless of whether it notified the requester of the possibility that phone logs might be public records under different circumstances. The trial court awarded Lancaster free-standing penalties for conduct unrelated to the denial of records despite its conclusion that the Department had a good faith basis for denying the records.

Therefore, the trial court erred in ignoring the causation requirement in RCW 42.56.565(1) and awarding penalties based on alleged bad faith conduct that did not result in the denial of records.

C. The Court Should Remand for Determination of Costs

As discussed above, the trial court erred in awarding penalties to Lancaster and that decision should be reversed. Based on the Department's concession that inmate phone logs are public records, Lancaster is entitled to reasonable costs in the trial court. Because the Department conceded that it violated the PRA, an award of costs was appropriate. RCW 42.56.540(4); *Francis*, 178 Wn. App. at 67. However, the award of costs must be viewed in light of the Department's offer of judgment in this case. If the Court reverses, it should remand this case to the trial court for the trial court to evaluate its award of costs to Lancaster.

VII. CONCLUSION

The trial court erred in finding bad faith and imposing penalties upon the Department. The Department did not initially provide records

based on an objectively reasonable policy regarding phone logs maintained by a third-party contractor and not used in agency business. The trial court erred in finding bad faith despite the fact that the purported bad faith did not result in the denial of any records. This Court should reverse and remand for the trial court to enter a finding that the Department did not act in bad faith and for the trial court to evaluate the award of costs in light of the finding of no bad faith.

RESPECTFULLY SUBMITTED this 14th day of November, 2017.

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I certify that on the date below I caused to be electronically filed the OPENING BRIEF OF THE DEPARTMENT OF CORRECTIONS with the Clerk of the Court using the electronic filing system and I hereby certify that I have mailed by United States Postal Service the document to the following non electronic filing participant:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 14th day of November, 2017 at Olympia, Washington.

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